Supreme Court, U.S.
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92-1355

No. _____

In The Supreme Court of the United States

October Term, 1992

FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, et al.,

Petitioners,

vs.

ROGER E. WILLIAMS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February 8, 1993

QUESTIONS PRESENTED FOR REVIEW

The District Court enforced subpoenas, directed to third-party banks, which requested production of Church tithing accounts, Church general accounts, and the personal accounts of Church leaders. The issues presented are:

1. Does the Court of Appeals have jurisdiction, prior to final judgment, to hear an appeal from an order rejecting a claim of First Amendment privilege?

2. Did the District Court err in failing to hold an evidentiary hearing to consider the merits of defendants' claims of constitutional privilege before ordering production of the Church's financial records?

3. Where the operations of the United Effort Plan are an important form of religious expression, may former Church members obtain discovery of church tithing and operational accounts without making a preliminary showing that Church leaders improperly diverted Church monies to personal use?

LIST OF ALL PARTIES TO THE PROCEEDING

Defendants/Petitioners: Fundamentalist Church of Jesus Christ of Latter-Day Saints, United Effort Plan, Rulon T. Jeffs, Fred M. Jessop, LeRoy S. Jeffs, Parley J. Harker, James K. Zitting, Winston K. Blackmore, Truman I. Barlow.

Plaintiffs/Respondents: Roger E. Williams, Beth Peterson, G. W. Cawley, Connell J. Bateman, Jesse Beagley (deceased), Benjamin G. Bistline, James B. Blackmore, Harold W. Blackmore, Cyril Bradshaw, Alma J. Burnham, Claude S. Cooke, Donald B. Cox, Harvey J. Dockstader Sr., Leah K. Dockstader (deceased), T. David Dockstader, Boyd Dockstader, Marko J. Dutson, George Hammon, Jacob LeGrande Hammon, Earl Johnson, James M. Pipkin, Cora Fischer Stubbs, David L. Stubbs, John Timpson,

Ray Timpson, Don Timpson, Fayila Maureen Blackmore Williams, John M. Williams, Thomas J. Williams, Merrill Harker, Andrew Bistline.

Other Defendants: City of Hildale, Utah; Town of Colorado City, Arizona; Samuel S. Barlow; Louis J. Barlow; Earl Jack Knudson Jr. (deceased); Colorado City Improvement Association; Twin City Water Works, Inc.

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REFERENCES TO DECISIONS BY LOWER COURTS

The District Court entered an unpublished Memorandum Decision and Order on November 16, 1990. (Appendix B.)

The Court of Appeals entered an unpublished Order and Judgment on November 10, 1992. (Appendix A.)

GROUNDS FOR SUPREME COURT JURISDICTION

The Court of Appeals' decision was entered November 10, 1992. No petition for rehearing was filed. The Supreme Court has jurisdiction to review the decision by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioners are defendants in this action, filed by 31 former members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS Church" or "Church"). The schism arises out of a disagreement over the interpretation of a scripture relating to the leadership of the Church, and a resulting dispute as to succession to the post of President of the Church. After their departure from the Church, the plaintiffs sued the Church, certain leaders of the Church, and the United Effort Plan, a religious trust established by the priesthood of the Church in 1942, for a variety of claims including fraud, breach of trust,

violation of securities laws, and civil rights violations. Federal jurisdiction was premised on 28 U.S.C. § 1331.

The particular issue at this interlocutory stage of the proceedings is the propriety of an order of the District Court that the financial records of the Church and its leaders be disclosed to the plaintiffs. The account records include the primary tithing accounts of the Church itself. The District Court ordered broad disclosure of all accounts on the theory that the plaintiffs, as former members of the Church and of the United Effort Plan, were beneficiaries of a common law trust and were entitled to the information. Funds in the tithing account, and other accounts in the names of church leaders, have occasionally been used to pay property tax on real property owned by the United Effort Plan, but there has been no showing that Church funds are impressed with any trust.

The Fundamentalist Church ("FLDS" Church") traces its roots to the beginnings of the Mormon Church in the 1830s. Members of both churches accept the Bible, the Book of Mormon, the Doctrine and Covenants ("D. & C.")[1], and the Pearl of Great Price as holy scripture. Members of the FLDS Church believe that their Church is the true continuation of the church founded by Joseph Smith in 1830. The split occurred around the turn of the century, when the Mormon Church, under great pressure from the Federal government, abandoned certain beliefs which members of the FLDS Church believe were ordained by God, including the Law of Consecration and Stewardship (D. & C. 42:30-39) and the principle of plural marriage (D. & C. 132:61-62).

It is the Law of Consecration and Stewardship (also known as the United Order of Heaven) which is at issue in this case. The Law, which in its present form dates to 1831, is set forth in Section 42 of the

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[1]The beliefs at issue in this case derive primarily from the Doctrine and Covenants. The Doctrine and Covenants is a compilation of revelations, most of which were received by the Prophet Joseph Smith for the establishment and governance of the Kingdom of God in the latter days. It is a standard work of the Church and functions as its open, ever-expanding, ecclesiastical constitution.

1 D. Ludlow, *Encyclopedia of Mormonism* 405 (1992).

Doctrine and Covenants.[2] One author has explained it as follows:

> Upon the basic principle that the earth and every thing on it belongs to the Lord, every person who was a member of the church at the time the system was introduced or became a member thereafter was asked to "consecrate" or deed all his property, both real and personal, to the bishop of the church. The bishop would then grant an "inheritance" or "stewardship" to every family out of the properties so received, the amount depending on the wants and needs of the family, as determined jointly by the bishop and the prospective steward. ... It was expected that in some cases the consecrations would considerably exceed the stewardships. Out of the surplus thus made possible the bishop would grant stewardships to the poorer and younger members of the church who had no property to consecrate.

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[2]The text of the scripture, which is dated February 9, 1831, follows:

> 30. And behold, thou wilt remember the poor, and consecrate of thy properties for their support that which thou hast to impart unto them, with a covenant and a deed which cannot be broken.
>
> 31. And inasmuch as ye impart of your substance unto the poor, ye will do it unto me; and they shall be laid before the bishop of my church and his counselors, two of the elders, or high priests, such as he shall appoint or has appointed and set apart for that purpose.
>
> 32. And it shall come to pass, that after they are laid before the bishop of my church, and after that he has received these testimonies concerning the consecration of the properties of my church, that they cannot be taken from the church, agreeable to my commandments, every man shall be made accountable unto me, a steward over his own property, or that which he has received by consecration, as much as is sufficient for himself and family.
>
> 33. And again, if there shall be properties in the hands of the church, or any individuals of it, more than is necessary for their support after this first consecration, which is a residue to be consecrated unto the bishop, it shall be kept to administer to those who have not, from time to time, that every man who has need may be amply supplied and receive according to his wants.
>
> 34. Therefore, the residue shall be kept in my storehouse, to administer to the poor and the needy, as shall be appointed by the high council of the church, and the bishop and his council;
>
> 35. And for the purpose of purchasing lands for the public benefit of the

L. Arrington, F. Fox & D. May, *Building the City of God* 15 (1976) (footnote omitted). The principle is also set forth in the Bible[3] and in the Book of Mormon.[4]

In 1886, Mormon Church President John Taylor ordained several people, including Lorin C. Woolley, with a special assignment. Taylor feared the course secular events were forcing the church to take, and gave those individuals the special assignment of maintaining the principles of the church that were under attack at the time. Woolley

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church, and building houses of worship, and building up the New Jerusalem which is hereafter to be revealed--

36. That my covenant people may be gathered in one in that day when I shall come to my temple. And this I do for the salvation of my people.

37. And it shall come to pass, that he that sinneth and repenteth not shall be cast out of the church, and shall not receive again that which he has consecrated unto the poor and the needy of my church, or in other words, unto me--

38. For inasmuch as ye do it unto the least of these, ye do it unto me.

39. For it shall come to pass, that which I spake by the mouths of my prophets shall be fulfilled; for I will consecrate of the riches of those who embrace my gospel among the Gentiles unto the poor of my people who are of the house of Israel.

D. & C. 42:30-39. See also D. &. C. 83:5-6.

[3]Acts 4:32-35 provides:

> And the multitude of them that believed were of one heart and of one soul: neither said any of them that ought of the things which he possessed was his own; but they had all things common.... Neither was there any among them that lacked: for as many as there were possessors of lands or houses sold them, and brought the prices of the things that were sold, [a]nd laid them down at the apostles' feet: and distribution was made unto every man according as he had need.

In addition, the story of Ananias and Sapphira in Acts 5 demonstrates application of the law of consecration by Peter.

[4]4 Nephi 2-3 provides:

> [T]here were no contentions and disputations among them, and every man did deal justly one with another. And they had all things common among them; therefore there were not rich and poor, bond and free, but they were all made free, and partakers of the heavenly gift.

was the last survivor of the group, and, to perpetuate the assignment given him by Taylor, ordained the members of the Priesthood Council in the late 1920s. At that time, this religious movement was known as the "Priesthood Work." The UEP, the FLDS Church, and the Priesthood Council which leads the Church, are continuations of the Priesthood Work and Priesthood Council ordained by Woolley.

In 1942, the leaders of the Priesthood Council, in order to facilitate the living of the United Order of Heaven, formed the United Effort Plan. A trust agreement was signed because Church members needed a legal entity to hold their property in common, as instructed by scripture. The United Effort Plan was under the direction of the Priesthood Council. For 42 years until 1984, all meetings of the United Effort Plan were held in conjunction with meetings of the Priesthood Council.

The United Effort Plan owns no property other than real estate consecrated over the years by Church members (primarily the real estate upon which church members live in Colorado City, Arizona and Hildale, Utah). It does not have its own bank account, and has not had a bank account since approximately 1949. The single operating expense of the UEP (tax on real property) has been paid by the Church from Church funds held in the names of Church leaders.

It is undisputed that plaintiffs' only claimed donations were to Truman Barlow for property taxes, that those funds were deposited in the Bank of Ephraim in Barlow's account, and that the taxes have always been paid in full. The only money which the plaintiffs can trace into *any* other account is a single check for $3.00 written to Fred Jessop in 1986.

The plaintiffs subpoenaed account records for six church operational accounts, sixteen accounts of individual defendants, and one account involving a third party. The specific accounts, and plaintiffs' contentions regarding the accounts, are described in Appendix C to this Petition.

The operational accounts of the FLDS Church contain tithing and other religious contributions made by Church members. Monies

deposited in these accounts are used for support of the Church and its leaders, for the support of Church projects, and to carry out the charitable and philanthropic activities of the Church. The funds are used at the discretion of the President of the Church.

Church doctrine requires that Church members pay their alms in secret. Book of Mormon, 3 Nephi 13:1-4.[5] Production of the general tithing account records of the Church would disclose the identities of donors. President Jeffs testified that he believes the production of the specified account records would constitute a direct violation of the scriptural mandate and thus would constitute a violation of the religious tenets of the FLDS Church.

Church members who have paid tithing and have made contributions to the FLDS Church also believe and have testified that the production of the specified records would constitute a violation of their religious beliefs and their right to free exercise of their religious beliefs. Because of the controversial views of the Church (particularly regarding plural marriage), members of the Church believe that production of the specified documents, and the resultant disclosure of their affiliation with the Church, may cause them to be held up to public ridicule and embarrassment, and thus violate their freedom of religious association.

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[5]The proscription against revealing these records arises from the following scriptural authority:

> Verily, verily, I say that I would that ye should do alms unto the poor; but take heed that ye do not your alms before men to be seen of them; otherwise ye have no reward of your Father who is in heaven.
>
> Therefore, when ye shall do your alms do not sound a trumpet before you, as will hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, they have their reward.
>
> But when thou doest alms let not thy left hand know what thy right hand doeth;
>
> That thine alms may be done in secret; and thy Father who seeth in secret, himself shall reward thee openly.

Book of Mormon, 3 Nephi 13:1-4. *See also* D. & C. 119:1-7.

REASONS WHY CERTIORARI SHOULD ISSUE

The Court of Appeals held that it lacked jurisdiction over the appeal because the denial of a motion to quash discovery subpoenas is interlocutory in nature. The court ruled that the three-pronged test[6] of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), was not satisfied because characterization of the subpoenaed entities and bank accounts as religious or secular in nature goes to the merits of the case.

This is not an ordinary discovery dispute. The privilege asserted is a constitutional one. The question presented is an important and sensitive question of First Amendment jurisprudence which merits this Court's attention. The District Court refused to hold an evidentiary hearing to consider the merits of the constitutional claims before ordering disclosure of the documents. If the Court of Appeals lacks jurisdiction to hear the appeal before disclosure of the information which petitioners claim is protected, then petitioners' right to challenge the order will be totally and irreparably lost. The information will be disclosed before *any* court has considered the merits of the claim of constitutional privilege.

> [T]he threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential.

Britt v. Superior Court of San Diego County, 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766, 744 (1978) (disallowing discovery that infringed freedom to associate).

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[6]Under the *Cohen* doctrine, review can occur prior to final judgment if the following three characteristics are met:

> First, the order must "conclusively determine the disputed question." Second, the order must "resolve an important issue completely separate from the merits of the action." Third and finally, the order must be "effectively unreviewable on appeal from a final judgment."

Gulfstream Aerospace Corp. v. Mayecamas Corp., 485 U.S. 271, 276 (1988) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

Plaintiffs are not entitled to judicial review of the use of funds in the general Church tithing account or the Bishop's storehouse account. Because the lower court did not first require plaintiffs to make some preliminary showing of misuse of the funds in the accounts, the order as it stands is tantamount to allowing a parishioner who contributes money to a local parish at Sunday Mass to examine the accounts of the parish, its leaders, and anyone else who contributes money including, if financial assistance for the parish comes from the Vatican, of the Catholic Church itself.

Moreover, in the case at bar the plaintiffs were not required to show that any funds contributed by them had been deposited in the accounts to which the court granted them access. The banking records to which the plaintiffs seek unlimited access include accounts which have been used to deposit thousands of religious contributions made to the Church over a period exceeding 20 years. Of those donations, there was *only one* check, for *$3.00*, that was deposited into any of the subpoenaed accounts other than Truman Barlow's account at the Bank of Ephraim.

The harm feared by defendants will immediately occur when plaintiffs are given access to the records. The religious contributions of hundreds of individuals, the vast majority of whom are not parties to this litigation and many of whom are deceased, as well as the discretionary expenditures of those funds by the religious leaders who held the confidence of these religious donors, will be disclosed under compulsion. This is a matter that requires immediate resolution.

Cases addressing the issue to date generally involve churches which have committed fraud in the solicitation of donations. In these cases, disclosure is ordered *after* a substantial evidentiary record has been developed establishing the existence of the fraud. *E.g., Ambassador College v. Geotzke*, 675 F.2d 662 (5th Cir.), *cert. denied*, 459 U.S. 862 (1982); *In re The Bible Speaks*, 69 B.R. 643 (Bankr. D. Mass. 1987). In contrast, the plaintiffs in the case at bar, when challenged, simply assert that they are entitled to discovery because they have alleged fraud (breach of fiduciary duty) in their pleadings. Despite five years and tens of thousands of pages of discovery, plaintiffs have yet

to refer to anything other than their pleadings when challenged to provide support for their claims of fraud.

Defendants raised these deficiencies in the District Court, and asked the District Court to conduct an evidentiary hearing to determine if plaintiffs' fraud claims were of such substance that they ought to merit a look at the private records of the Church and the other defendants; in other words, whether a compelling reason had been shown to invoke the power of the government to force disclosure of sacred and confidential information. Despite the palpable absurdity of the fraud claims, the court declined. Moreover, despite the undisputed facts that plaintiffs' only claimed donations were to Truman Barlow for property taxes, that those funds were deposited in the bank of Ephraim in Barlow's account, and that the taxes have been paid in full, the court permitted disclosure of all records of 23 accounts covering several decades. The order is patently overbroad.

Information, once disclosed, is forever disclosed. The claim of constitutional privilege is "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978). The questions of First Amendment rights of association and religion are too important and serious to be denied review at this juncture.

This case falls within the ambit of *Perlman v. United States*, 247 U.S. 7 (1918). In *Perlman*, the Supreme Court held that when a subpoena is directed to a person who has custody of material as to which another person may claim a privilege of nondisclosure, the person who holds the privilege may seek immediate review of the disclosure order. The justification for permitting immediate appeal under these circumstances is that the privilege holder has no power to compel the custodian of the material to risk a contempt citation for his refusal to comply with the court's order. Thus, denying the holder of the privilege the right to immediately review would leave him "powerless to avert the mischief of the order." 247 U.S. at 13.

In the case at bar, the plaintiffs have served subpoenas on defendants' banks. Defendants cannot compel the banks to challenge the subpoenas at the peril of a contempt citation. If review is not granted,

the accounts will be produced and defendants will have no further remedy.

The District Court's order impinges on the defendants' religious beliefs in three significant respects:

1. At the very heart of the Law of Consecration and Stewardship is the ability of Church leaders to allocate benefits among faithful members of the Church. Consecration is not an economic transaction--it is an act of faith and devotion and personal allegiance to the teachings of the Church. Similarly, the allowance of a stewardship is based upon Church leaders' prayerful judgment concerning the just wants and needs of the recipient, and is an expression of God's will. The District Court's decision, that former Church members have as a matter of secular law a continuing interest in the UEP, usurps this most basic of ecclesiastical decisions.

2. The court has required the Bishop to account to the former members, and to secular government authorities, for his management of consecrations and donations. Church doctrine vests the Bishop with discretion in these matters, and provides for upward, not downward, accountability; the Bishop is accountable to the Priesthood Council, the President of the Church, and ultimately to God for his decisions. D. & C. 82:15-21.[7]

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[7]The scripture provides:

> 15. Therefore, I give unto you this commandment, that ye bind yourselves by this covenant, and it shall be done according to the laws of the Lord.
>
> . . . .
>
> 17. And you are to be equal, or in other words, you are to have equal claims on the properties, for the benefit of managing the concerns of your stewardships, every man according to his wants and his needs, inasmuch as his wants are just—
>
> 18. And all this for the benefit of the church of the living God, that every man may improve upon his talent, that every man may gain other talents, yea, even an hundred fold, to be cast into the Lord's storehouse, to become the common property of the whole church—
>
> 19. Every man seeking the interest of his neighbor, and doing all things with an eye single to the glory of God.

3. The court has required the Church to disclose all of its financial dealings, as documented by the bank accounts of the Church and its leaders. These records go far beyond UEP transactions: The order reaches the personal and Church accounts of the trustees and even the general tithing accounts of the Church. This disclosure directly violates the Church's teaching that alms must be given in secret.

The decisions of the Arkansas Supreme Court in *Gipson v. Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986) ("*Gipson I*"); and 295 Ark. 371, 749 S.W.2d 297 (1988) ("*Gipson II*"), are well-reasoned, are directly on point, and provide a sound rule of law which should be applied in the case at bar and similar cases presenting this sensitive issue. The plaintiffs, relying on the status of the Sixth and Izard Church of Christ as a non-profit corporation, alleged a statutory right of access to financial data and other business information relating to the church. The plaintiffs filed discovery requests for the information which was the object of the lawsuit, and the trial court ordered compliance with the requests. The Arkansas Supreme Court granted permission to appeal.

The church elders argued that "the tenets of the Church of Christ religion place authority for church administration solely in the hands of the elders and, pursuant to the dictates of their religion, the elders cannot be compelled to share this information with members of the congregation." 706 S.W.2d at 372. In *Gipson I*, the court remanded the case to the trial court "with instructions to conduct a hearing to determine whether application of [state law requiring a non-profit corporation to provide financial records to its members] would override the religious doctrine, polity or practice of the church as protected by the federal and state constitutions." *Gipson II*, 749 S.W.2d at 298.

Upon remand, the trial court conducted such a hearing and again

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20. This order I have appointed to be an everlasting order unto you, and unto your successors, inasmuch as you sin not.

21. And the soul that sins against this covenant, and hardeneth his heart against it, shall be dealt with according to the laws of my church, and shall be delivered over to the buffetings of Satan until the day of redemption.

D. & C. 82:15-21.

ordered the records produced. The Supreme Court reversed. It concluded that "the appeal should be dismissed. The underlying dispute between the elders and the members of the church is essentially religious in nature, and its resolution is more properly reserved to the church." *Gipson II*, 749 S.W.2d at 298. The court viewed its function to be directed "not to a determination of what exactly the Bible teaches; rather, we consider whether the evidence supports the conclusion that the elders believe the tenets of the church to be as described and whether those beliefs serve as the basis of appellants' claim to an exemption from the code provisions governing nonprofit corporations." *Id.* at 301.

> We find that the record reveals substantial evidence to the effect that the elders' claim of an exemption is in fact tied to established doctrine within the church: (1) the New Testament places within the hands of a select group of elders the sole responsibility for overseeing the affairs of the church and its congregation; (2) the scriptural duty extends to all aspects of administration within the church with the elders being accountable to God for the execution of their responsibility in a manner consistent with the Bible; (3) the scriptural purpose behind the doctrine is the mandate that there be harmony and unity within the flock; and (4) the execution of the responsibility is a matter left to the scripturally guided discretion of the elders as evidenced by biblical admonitions to the flock to obey and submit to them that have rule over the flock. In light of the above, application of our state corporation laws would almost certainly infringe upon the doctrine of the church.

Id. at 300-01.4123

In the case at bar, the same doctrines are involved (*e.g.*, Hebrews 13:17), along with the more specific directions set forth in the Doctrine and Covenants. That should end the matter.

> [T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of

> ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

Jones v. Wolf, 443 U.S. 595, 604 (1979).

As a first principle, the discovery order in this case must be directed to information which has some relevance to an issue which the court is empowered to act upon. The District Court intends to inspect the accounts of the Church and to substitute its judgment and perhaps that of a jury for that of the leaders of the Church concerning the appropriateness of the transactions so disclosed.

> Plaintiffs have brought claims which call into question the fair and forthright management of Trust assets. As such, the Trust must provide plaintiff an opportunity to inspect Trust operation and management.

Memorandum Opinion, Appendix B at 10. This reasoning is erroneous. The court should not substitute its judgment for that of Church elders in this area of religious work.

> The only way a governmental entity can validly take action that constitutes an infringement on the free exercise of religion is (1) to justify its action under some "compelling state interest" and (2) to show that there are no less intrusive alternative means by which that interest can be vindicated.

D. Oaks, Trust Doctrines in Church Controversies, 1981 B.Y.U. L. Rev. 805, 892 (footnote omitted).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court issue a writ of certiorari to the Tenth Circuit Court of Appeals to consider the questions raised in this petition.

Respectfully submitted,

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February 8, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 91-4076

ROGER E. WILLIAMS, et al.,

Plaintiffs-Appellees,

vs.

UNITED EFFORT PLAN, et al.,

Defendants-Appellants,

and

CITY OF HILDALE, et al.,

Defendants.

November 10, 1992

ORDER AND JUDGMENT*

Before MOORE and TACHA, Circuit Judges, and SAFFELS,** Senior District Judge.

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

MOORE, Circuit Judge.

After examining the briefs and appellant record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendant-appellants appeal the district court's denial of their motion to quash subpoenas issued to a nonparty bank. Defendants argue that disclosure of the information subpoenaed would violate defendants' First Amendment rights. Before we can reach the merits of defendants' claims, we must determine whether we have jurisdiction to hear this appeal.

Ordinarily, pretrial discovery orders are not appealable because they do not constitute final orders under 28 U.S.C. § 1291. *Graham v. Gray*, 827 F.2d 679, 681 (10th Cir. 1987); *F.T.C. v. Alaska Land Leasing, Inc.*, 778 F.2d 577, 578 (10th Cir. 1985). "The denial of a motion to quash a subpoena is interlocutory in nature and not an appealable order." *In Re Grand Jury Proceedings*, 857 F.2d 710, 711 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989). There is an exception to the finality rule when the order appealed from is a collateral order. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). To be appealable under the *Cohen* exception, an order must (1) conclusively resolve a disputed question; (2) resolve an issue completely separate from the merits of the underlying action; and (3) be effectively unreviewable on appeal from a final judgment in the underlying action. *United States v. Dickstein*, 971 F.2d 446, 448 (10th Cir. 1992). We hold that the order appealed from in this case does not meet the requirements of the *Cohen* doctrine and therefore, we lack jurisdiction to hear this appeal.

The district court, in denying defendants' motion to quash the subpoenas, found that compliance with the discovery order would not violate defendants' First Amendment rights. Consequently, addressing the merits of defendants' appeal would entail analysis and determination of defendants' constitutional rights relative to the various subpoenaed bank accounts which, in turn, would involve characteriza-

tion of the accounts and the various entities involved. Characterization and analysis of the various entities and their relationships is also an integral part of the merits of the underlying case. Because the order appealed from did not resolve an issue completely separate from the merits of the underlying action, the order does not fall within the *Cohen* exception, and therefore, we lack jurisdiction on that basis.

Defendants alternatively assert jurisdiction under 28 U.S.C. §1292(a)[3], claiming that the order entered by the district court grants injunctive relief. Denial of a motion to quash a subpoena is generally not appealable as an injunction under § 1292(a). *See United States v. Ryan*, 402 U.S. 530, 534 (1971); *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1422 n.6 (3d Cir. 1991; *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 256 (lst Cir. 1989).

The appeal is DISMISSED.

Entered for the Court

John P. Moore
Circuit Judge

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[3] 28 U.S.C. § 1292(a) provides in pertinent part that "the courts of appeals shall have jurisdiction of appeals from:

> . . . [i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions . . ."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Civil No. 87-C-1022J

ROGER E. WILLIAMS, et al.,

Plaintiffs,

vs.

UNITED EFFORT PLAN, et al.,

Defendants,

November 16, 1990

MEMORANDUM OPINION AND ORDER

On November 9, 1989, the parties in the above matter came before the court for argument on a series of motions. The court took under advisement motions filed by plaintiffs Stubbs, Dockstader, and Bistline[1] for partial summary judgment on the thirty-first cause of action in the second amended complaint. The thirty-first cause of action seeks a judgment declaring plaintiffs' transfers of property to defendant United Effort Plan Trust (the "Trust" or "UEP") null and void on the ground that UEP is a common law trust legally incapable of taking title to property.

---

[1] Plaintiffs David L. Stubbs, Leah K. Dockstader, and Andrew Bistline filed the motions for partial summary judgment on the thirty-first cause of action.

The court also took under advisement plaintiffs' motion for partial summary judgment on the twenty-third cause of action in the second amended complaint. In their twenty-third cause of action, plaintiffs seek a judgment requiring the trustees of UEP to provide plaintiffs an accounting of Trust assets and transactions. At the November 9, 1989 hearing, the court also took under advisement the narrow question of whether the Fundamentalist Church of Jesus Christ of Latter-day Saints could constitutionally (under the First Amendment) hold Sunday School classes in the Hildale town hall. That question will be treated in a separate order.

Finally, on March 5, 1990, the court heard argument on Trust defendants'[2] motion for a protective order and to quash subpoenas. In this motion, defendants seek to prohibit plaintiffs from conducting discovery pertaining to bank accounts maintained in the names of individual trustees, but which are characterized as "Church Operation Accounts." Defendants also seek to prohibit plaintiffs from gaining access to bank accounts maintained in the names of individual trustees. Defendants concede that the accounts in this second category are used for personal purposes.

Having considered the pleadings, memoranda, and arguments advanced by counsel, the court in this opinion rules on the three motions discussed above. For the reasons set forth below, the court denies plaintiffs' motions for partial summary judgment on the thirty-first cause of action, grants plaintiffs' motion for partial summary judgment on the twenty-third cause of action, and denies Trust defendants' motion for a protective order and to quash subpoenas.

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[2]The term "Trust defendants" has been used by the parties in various pleadings to refer to the Trust itself and to its trustees: Rulon T. Jeffs, Fred M. Jessop, LeRoy S. Jeffs, Parley J. Harker, James K. Zitting, Winston K. Blackmore, and Truman I. Barlow. However, this motion for protective order seeks to protect only bank accounts in the names of Truman I. Barlow, Rulon T. Jeffs, Fred M. Jessop, and former trustee LeRoy S. Johnson.

I.

Much of the factual background in this case remains in dispute.[3] However, for purposes of the motions treated in this opinion, this much is clear. In the first half of this century, a group of primarily religiously motivated people settled in an area located in Southern Utah and Northern Arizona originally known as Short Creek. The area has since come to be known as Hildale, Utah and Colorado City, Arizona. Although the two communities are located in different states, they are contiguous and they form, in effect, one community. The residents of Hildale and Colorado City apparently sought to develop a community that would allow them to practice the tenets of their religion without outside interference.[4]

In 1942, the leaders of this community created an entity known as the United Effort Plan Trust. Trust defendants maintain that the Trust was established by community religious leaders in order "to promote the religious principals [sic] of the United Order." Trust Defendants' Memorandum in Support of Motion for Protective Order and to Quash Subpoenas, Jan. 5, 1990, at 3. While there is considerable factual dispute between the parties as to the purposes, functions, and dealings of the Trust,[5] it is clear that most (if not all) members of the community have contributed varying amounts of property, income, and labor to the

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[3] This court has encountered considerable difficulty in isolating disputed from undisputed facts. This is due, in large measure, to the parties' disregard of Rule 5(e) of the Civil Rules of Practice of the United States District Court for the District of Utah. Rule 5(e) requires litigants to number material disputed and undisputed facts in their memoranda supporting and opposing summary judgment. Such practice enables the parties and the court to narrow the issues and focus upon that which actually is in dispute.

[4] Though the point is somewhat disputed between the parties, the group that settled in Hildale and Colorado City appears to be a break-off from the Church of Jesus Christ of Latter-day Saints. The residents of the two cities sought a place in which they could practice the "Priesthood Work," which included, among other teachings, the practice of polygamy and establishment of a communal lifestyle known as the "United Order."

[5] One of the central factual disputes in this case concerns the relationship of the Trust to the church known as the Fundamentalist Church of Jesus Christ of Latter-day Saints (the "FLDS Church"). Defendants claim that the Trust and the FLDS Church are one

Trust. Even the homes in which Trust members reside rest on land that has been "conveyed" to the Trust.[6]

In the 1980's, a religious schism developed among the trustees themselves and among beneficiaries of the Trust. The dispute involved the order of succession and the rightful vestiture of spiritual authority to lead the religious community. A majority of Trust members sided with then trustee and religious leader LeRoy S. Johnson. A significant minority of Trust members aligned themselves with trustees J.M. Hammon and Alma Timpson. As a result of the dispute, Johnson dismissed both Hammon and Timpson from the governing religious body, the Priesthood Council. Since that time, the two factions have been at odds over issues ranging from religious doctrine to rightful ownership of property located in Hildale and Colorado City.

Plaintiffs in this case consist largely of Trust members who sided with the minority group. Plaintiffs have brought numerous causes of action against the Trust, the individual trustees, the FLDS Church, and the municipalities, alleging that these defendants have violated their constitutional rights and committed various acts of fraud and breach of fiduciary duty. Plaintiffs also claim that the Trust has denied them the rightful ownership and use of their property. Plaintiffs insist that the dispute over Trust property is divorced from religious doctrine and governance and that their relationship to the Trust can be evaluated on purely secular, civil law principles. Defendants contend that the case is inextricably tied up in matters of religious doctrine, since the FLDS Church, the priesthood Council, and the Trust allegedly are inseparable entities. It is in this disputed context that the court turns to the parties' individual motions.

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and the same, each acting as separate arms of the same body. Plaintiffs, on the other hand, maintain that the FLDS Church is a recent creation that never existed officially until the onset of this litigation. Thus, plaintiffs contend that the Trust is an entity without religious connection, entirely separate and distinct from the FLDS Church.

[6] Title to the land upon which the homes are constructed is one of the fiercely contested issues in this case. Thus, the term "conveyed" is not intended to express the court's decision or opinion on rightful title to the land.

II.

Plaintiffs Stubbs, Dockstader, and Bistline have filed motions for partial summary judgment on the thirty-first cause of action, seeking declaratory relief to the effect that their conveyances to the Trust of real property are facially invalid and void. Plaintiffs argue in their motions that the Trust is a common law or private trust, which is a legal relationship incapable of taking title to property. Plaintiffs assert therefore that any conveyances to the Trust are without effect. Defendants, however, contend that the Trust is a religious, charitable trust.[7] Defendants direct the court to well-accepted trust law principles that a conveyance or bequest to a charitable trust will not fail due to technical deficiencies in the conveyance documents.

Based upon these arguments, the court must at this point deny plaintiffs' motions for summary judgment. As defendants correctly point out, the validity of conveyances to the Trust cannot be determined until the legal status (private or charitable) of the Trust is resolved. This court previously denied plaintiffs' motion for partial summary judgment regarding the private/charitable status of the Trust. The court cannot logically assess the validity of conveyances to the Trust until the status question is resolved. Plaintiffs' motions for partial summary judgment on the thirty-first cause of action thus present genuine issues of material fact. See Fed. R. Civ. P. 56(c). The court denies the motions at this time.

III.

Plaintiffs have also moved the court for partial summary judgment on the twenty-third cause of action in the second amended complaint. The twenty-third cause of action alleges that the trustees of UEP have refused to provide plaintiffs an accounting of Trust assets, transactions, and dealings. The twenty-third cause of action further sets forth

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[7] The Trust's status as either charitable or private is the subject of a motion for partial summary judgment that the court denied at the November 9, 1989 hearing. The court determined that many disputed factual issues render premature any characterization concerning the Trust's legal status.

plaintiffs' demand that the trustees provide such an accounting. The court notes that there are no disputed issues of material fact that pertain to this motion. Trust defendants readily concede that many of the plaintiffs in this case are beneficiaries of the Trust. *See* Trust Defendants' Memorandum in Opposition to Motion for Partial Summary Judgment as to Twenty-Third Cause of Action, Sept. 5, 1989, at 3. Thus, the court passes upon the controlling questions of law.

In support of their motion, plaintiffs direct the court's attention to the relevant section of the Utah Probate Code concerning a trustee's duty to provide an accounting of trust assets. Section 75-7-303 of the Code provides in pertinent part:

> **75-7-303. Duty to inform and account to beneficiaries.**
>
> (1) The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:
>
> * * *
>
> (b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.
>
> (c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

Utah Code Ann. § 75-7-303 (1978).[8] Plaintiffs then assert -- and Trust

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[8] Plaintiffs also point out that the legal status -- private or charitable -- of UEP is immaterial as it relates to the trustees' duties to provide an accounting. Section 75-1-201(45) of the Utah Probate Code clearly defines the term "Trust" to include "any express trust, *private or charitable*, with additions thereto, wherever and however created." Utah Code Ann. § 75-1-201(45) (1978) (emphasis added). Thus, UEP clearly is a "Trust" subject to the duties set forth in section 75-7-303.

defendants concede -- that plaintiffs have requested that the Trust provide an accounting.

As is noted above, there is no question concerning plaintiffs' status as beneficiaries. Trust defendants simply dispute the reasonableness under Utah law of plaintiffs' requests for an accounting. Specifically, Trust defendants proffer two primary arguments in response to plaintiffs' demand for an accounting. The court has considered defendants' arguments and is persuaded by neither.

First, defendants argue that, pursuant to section 75-7-201(l) of the Utah Probate Code,[9] Utah state courts exercise exclusive jurisdiction over matters of trust law. Defendants contend, then, that this court should dismiss plaintiffs' twenty-third cause of action and require plaintiffs to pursue a demand for accounting in state court. Notwithstanding section 75-7-201(l) and its "exclusive jurisdiction" language, this court adopts the general principle that federal courts should usually reject state legislative attempts to limit the reach of federal jurisdiction. *See generally* 76 Am. Jur. 2d *Trusts* § 280 (1975). The Tenth Circuit in *Holt v. King*, 250 F.2d 671, 675 (10th Cir. 1957), followed this principle when it held that, when the parties are properly before a federal court, the court should rule upon probate matters which do not require the court to assume "general probate jurisdiction." The *Holt* court went on to emphasize that:

> As the jurisdiction of the courts of the United States is derived from the federal constitution and statutes, that jurisdiction is not subject to restraint or limitation by state legislation establishing courts of probate and giving them exclusive jurisdiction over the estates of decedents.

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[9] Section 75-7-201(1) provides for state court jurisdiction over trusts and provides in pertinent part:

> (l) The court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts.

Utah Code Ann. 75-7-201(l) (1978).

Id. Here, the parties have asserted claims arising under the United States Constitution. The parties are properly before this court on the basis of federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court may thus consider plaintiffs' pendent state law claim for an accounting, and such consideration does not require this court to assume "general probate jurisdiction." *Id.*

As a second basis for their opposition to plaintiffs' motion, Trust defendants point to language in the UEP Declaration of Trust, which purports to limit beneficiaries' rights to request an accounting. Section XIV of the Declaration of Trust provides as follows:

> Membership in said association shall not entitle the member to any part of the trust property, either personal, real, or mixed; nor the right to call for a partition or division of the same, or for an accounting....

While Trust defendants concede that this provision does not relieve them of all responsibility to provide an accounting, they argue that the language severely restricts Trust members' rights and excuses the trustees from any obligation to provide regular reports.

Regardless of whether Trust defendants must provide "regular reports," this court can and does exercise its equitable power to require an accounting based upon plaintiffs' twenty-third cause of action. The Utah Supreme Court has expressly determined that trust provisions purporting to relieve trustees' duties to provide an accounting are "against public policy and will not be enforced." *In re Estate of Wallich*, 420 P.2d 40, 43 (Utah 1966); *see also Ferguson v. Miller*, 169 P.2d 610, 612 (Colo. 1946) (provision in trust relieving duty of accounting "does not oust an equity court of jurisdiction to require accounting"). Thus, under Utah trust law, Trust defendants' refusal to provide an accounting is not justified by Section XIV of the Declaration of Trust. That is particularly true in this case where there are allegations (though yet unproven) of fraud, bad faith, and breach of fiduciary duty. *See generally* Annotation, *Validity, Construction, and Effect of Provision of Trust Instrument Relieving Trustee From Duty to*

Account, 171 A.L.R. 631 (1947). Trust defendants must provide a full accounting[10] to plaintiffs.

IV.

In their motion for a protective order and to quash subpoenas, Trust defendants seek to protect from discovery in this litigation two types of bank accounts. The first category consists of accounts which, though maintained in the names of individual UEP trustees, are designated by defendants as "Church Operation Accounts."[11] Defendants claim the first category of accounts is protected from Rule 26 discovery based upon a qualified privilege grounded in the First Amendment (presumably, the Free Exercise Clause). The second category consists of bank accounts maintained in the names of individual trustees. Defendants concede that these accounts are used for personal purposes, but claim that defendant trustees should be protected from the "annoyance, embarrassment, and oppression" that would result from discovery of the accounts. Trust Defendants' Memorandum in Support of Motion for protective Order and to Quash Subpoenas, Jan. 5, 1990, at 2.

Plaintiffs, on the other hand, vigorously oppose the motion for

---

[10] Trust defendants assert that they have already provided plaintiffs an accounting because "the only assets of the trust are real property" and the deeds reflecting ownership "have always been a matter of public record." Trust Defendants' Memorandum in Opposition to plaintiffs' Motion for Partial Summary Judgment as to plaintiffs' Twenty-Third Cause of Action, Sept. 6, 1989, at 7. While in that same memorandum Trust defendants claimed to have "no accounts," they later conceded that various trustees have opened Trust-related accounts (so-called "Church Operation Accounts") in their own names. These "Church Operation Accounts" are the subject of Trust defendants' motion for protective order discussed *infra*. Thus, regardless of what Trust defendants have provided to this date, the court orders that plaintiffs be afforded a "statement of the accounts of the trust" and "relevant information about the assets of the trust and the particulars relating to administration." Utah Code Ann. § 75-7-303(1)(b), (c).

[11] Notwithstanding Trust defendants' characterization of the accounts as "Church Operation Accounts," Trust defendants concede that the accounts are maintained in the names of individual trustees and that Trust assets have been deposited regularly

protective order. Plaintiffs first point out that the bank accounts contain information relevant, even crucial, to the subject matter of the lawsuit. Plaintiffs next contend that the so-called "Church Operation Accounts" are not entitled to a First Amendment privilege, particularly where, as in this case, there are allegations of fraud and commingling, and the accounts are maintained in the names of individual trustees. Plaintiffs further argue that discovery of trustees' personal bank accounts is equally relevant to the lawsuit and will not unduly burden defendant trustees. The court agrees with plaintiffs in each of these contentions.

The court begins its analysis by looking to the Federal Rules of Civil Procedure. Rule 26 provides for discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." Fed. R. Civ. P. 26(b)(1). Rule 26 dictates a two-part inquiry: first, is the matter to be discovered relevant to the pending action; and second, is the matter privileged? *See In re The Bible Speaks*, 69 B.R. 643, 646 (Bankr. D. Mass. 1987).

The court need only briefly discuss the relevance of both categories of bank accounts to the instant action. Federal Rule 26 expressly provides that "[i]t is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Plaintiffs have alleged, among other things, that Trust defendants have engaged in commingling of funds, self-dealing, and breach of fiduciary duty with regard to Trust assets. It cannot be seriously argued that the bank accounts are not relevant when they are maintained in the sole names of the very parties who allegedly engaged in such fraudulent acts. At the very least, discovery of the bank accounts is "reasonably calculated" to lead to the discovery of admissible evidence in this case. Moreover, discovery of the trustees' personal bank accounts will not result in "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). The

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into the accounts. In fact, it is conceded that the Trust does not now have -- and never has had -- accounts maintained in the name of the Trust. Thus, the court looks behind the terminology affixed to the accounts for purposes of this motion and focuses, instead, upon the actual purposes and functions the accounts have served.

court rules that the personal accounts are clearly relevant and thus discoverable.

Having crossed the relevance threshold, the court turns to the question of First Amendment[12] privilege as it relates to the "Church Operation Accounts." Trust defendants insist that the Trust and the FLDS Church constitute, in function and purpose, a single entity. They argue therefore that any discovery of Trust bank accounts is tantamount to discovery of church accounts. Plaintiffs contend that the Trust is an organization separate and distinct from the FLDS Church[13] and that they contributed property and labor to the Trust, fully expecting to retain their interest in the Trust regardless of their standing in the Church.

In civil litigation, parties asserting privileges bear heavy burdens. Indeed, "[e]videntiary privileges are not favored, and even those rooted in the Constitution must give way in proper circumstances...." *Herbert v. Lando*, 441 U.S. 153, 175 (1979). The burden is all the more weighty in this case, since the court, in this opinion, has ordered Trust defendants to provide an accounting of Trust assets and transactions. Given the circumstances of this case, Trust defendants do not sustain the burden that accompanies the assertion of the privilege. Without deciding fully the question of the Church/Trust relationship, the court holds that Trust defendants do not assert a valid First Amendment privilege protecting the "Church Operation Accounts" from discovery.

The court in *Ambassador College v. Geotzke*, 675 F.2d 662 (5th Cir.

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[12] The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I.

[13] Plaintiffs argue that the Trust is necessarily separate from the FLDS Church, since the Church is a recent creation, so named for purposes of this litigation. In support of this contention, plaintiffs note the deposition of trustee Parley Harker, who testified that the FLDS Church was named "probably in the last year or two because there had to be some kind of a designation or definition." Plaintiffs' Reply to Trust Defendants' Memorandum in Support of Motion for protective Order and to Quash Subpoenas, Jan. 26, 1990, at 5.

1982), evaluated a situation similar to this case. In that case, the court examined First Amendment privilege where a daughter and sole heir sought to challenge her deceased mother's gift to a church-supported college. The daughter, in previous litigation, discovered over the church's First Amendment objection information concerning the College's and Worldwide Church of God's revenues, compensation to officers, and previously received gifts. The court, in rejecting Ambassador College's claim under 42 U.S.C. § 1983 for violation of the First Amendment, stated that:

> [C]ertain church members may have been over-zealous in their efforts to finance a seminary. Their actions may have been overreaching and they may have committed fraud. Thus, *the church must respond to discovery requests, as any other similarly situated litigant would be required.*

Id. at 664 (emphasis added).

As in the *Ambassador College* case, this court perceives no danger that discovery of the Trust's operating accounts will chill the free exercise of religion. Even if the court accepts as true defendants' contention that the Church and Trust are inseparable entities, the accounts themselves still pertain to the Trust and its operation. Plaintiffs have brought claims which call into question the fair and forthright management of Trust assets. As such, the Trust must provide plaintiff an opportunity to inspect Trust operation and management.

In *In re The Bible Speaks*, 69 B.R. 643 (Bankr. D. Mass. 1987), a former church member sought to annul on fraud and undue influence grounds millions of dollars worth of contributions to the Christian fundamentalist church with which she had affiliated. The debtor church invoked the First Amendment and sought to protect from discovery conversations between the former church member and church officials allegedly touching on religious doctrine and belief. The court noted the allegations of fraud and undue influence and held that the discovery sought did "not involve the real danger to First Amendment religious freedom -- excessive government entanglement

in religious affairs or in the evaluation of religious beliefs." *Id.* at 648. The court further reasoned that the danger to First Amendment freedoms was insignificant in "civil litigation between private parties." *Id.* at 647.[14]

The circumstances in this case dictate a result similar to those reached by the courts in *Ambassador College* and *In re The Bible Speaks.* The central dispute here is between private parties who claim certain rights as beneficiaries of a church-related Trust. Whatever limited First Amendment privilege Trust defendants may have in protecting the "Church Operation Accounts" is clearly outweighed by plaintiffs' compelling need to discover the accounts in the context of this litigation. There simply is no danger of intrusive government monitoring or regulation of religious activity. *Cf. United States v. Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1979) (rejecting First Amendment privilege even where the IRS sought discovery to determine church's tax exempt status). For these reasons, the court in this case rejects Trust defendants' assertion of a First Amendment privilege and denies Trust defendants' motion for a protective order and to quash subpoenas. Plaintiffs may conduct discovery into both the "Church Operation Accounts" and the accounts used by Trust defendants for personal purposes.

V.

In accordance with the foregoing analysis, the court orders, adjudges, and decrees as follows:

1. Plaintiffs' motions for partial summary judgment on the thirty-first cause of action in the second amended complaint are DENIED;

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[14] In this case, with the exception of the municipal defendants, the parties are private litigants. Though the municipal defendants in this case share many interests in common with Trust defendants, the municipal defendants have not argued either side of the motion for protective order, nor have they indicated any interest in scrutinizing the "Church Operation Accounts." The court perceives no danger that discovery of the bank accounts would allow the government to entangle itself in monitoring religious doctrine and governance. *See Ambassador College*, 675 F.2d at 664.

2. Plaintiffs' motion for partial summary judgment on the twenty-third cause of action in the second amended complaint is GRANTED; and

3. Trust defendants' motion for protective order and to quash subpoenas pertaining to bank accounts is DENIED.

IT IS SO ORDERED.

DATED this 16th day of November, 1990.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

Plaintiffs' contentions regarding the subpoenaed bank accounts are summarized below:

1. Rulon T. Jeffs

   a. Trust Account, Valley Bank & Trust (Salt Lake City)

      This was a trust account used by Presindent Jeffs in connection with his CPA practice. However, in recent years, the account became the depository account for Church tithing funds.

   b. Personal account, First Security Bank (main office)

      Plaintiffs admit this is purely a personal account and offer no basis other than bare suspicion upon which to examine it.

   c. Personal account, First Security Bank (400 South)

      There is no evidence at all regarding this account.

2. Fred M. Jessop

   a. Early Bird Cafeteria account, State Bank of Southern Utah (Cedar City)

      The only connection this account has to the UEP is that the cafeteria is located on UEP property.

   b. Standard Supply account, State Bank of Southern Utah (Cedar City)

      If any church money went into this account, it was before 1962. There is no evidence that it contains UEP or tax money, only "Church" money.

c. Twin City Water Works account, State Bank of Southern Utah (Cedar City)

The claim here is that Twin City Water Works (the water utility for the towns of Colorado City and Hildale) is an asset of the UEP.

d. Standard Fuels account, Stockmens Bank (Fredonia)

This is an account for Mr. Jessop's propane business. There is no evidence that it contains UEP or church money.

e. Personal account, Zions Bank (main office)

There is no evidence at all regarding this account.

f. Personal account, First Security Bank (400 South, Salt Lake City)

There is no evidence regarding this account. However, there is evidence regarding a personal account at First Security Bank in Cedar City. It was used in part for the health clinic operated by Mr. Jessop and which is located on UEP property.

3. Truman I. Barlow

For over 30 years, Mr. Barlow has used various accounts to assist hundreds of people in the Short Creek area with check cashing and other informal financial services, because the nearest bank is in Hurricane, Utah, some 30 miles away. Because of this practice, it is virtually impossible for Mr. Barlow to categorically affirm that funds eventually used to pay real property taxes on UEP property never passed through any of the accounts he has identified.

a. Personal account, First Security Bank (Cedar City)

This is one of the accounts used to run the service station (J&B Automotive). Mr. Barlow uses this account to cash checks for people, so it is likely that some money used to pay taxes may have passed through it.

b. Personal account, First Security Bank (St. George)

Mr. Barlow doesn't "think" that any money used to pay taxes went through this account. It is a business account for J&B Automotive.

c. J&B Automotive account, First Security Bank (Cedar City)

This is used for Mr. Barlow's personal expenses. He testified that some tax contributions could have passed through it.

d. J&B Automotive account, First Security Bank (St. George)

There is no evidence regarding this account. Plaintiffs' references are to transcribed arguments of counsel.

e. J&B Automotive account, First Security Bank (400 South)

There is no evidence at all regarding this account.

f. Personal account, First Interstate Bank (Cedar City)

Mr. Barlow could not recall if tax contributions flowed through this account.

g. Personal account, Zions Bank (main office)

There is no evidence at all regarding this account.

h. Personal account, State Bank of Southern Utah (Cedar City)

There are two accounts. Mr. Barlow said that tax funds could have gone through these accounts but he could not recall.

4. Mildred Johnson

a. Personal account, Dixie State Bank

This account is used for the care of the family of the late President Johnson. Church offerings are deposited in it monthly for that purpose. Mr. Barlow said there was a slim possibility that tax funds could have gone through this account.

Supreme Court, U.S.
FILED
MAR 9 1993
OFFICE OF THE CLERK

No. 92-1355

In The

Supreme Court of the United States

October Term, 1992

FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, et al.,

Petitioners,

vs.

ROGER E. WILLIAMS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 9, 1993

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QUESTIONS FOR REVIEW

In the District Court, Plaintiffs/Respondents sought discovery of certain bank accounts and Defendants/Petitioners filed a Motion to Quash Subpoenas and for a Protective Order. The District Court denied Defendants' Motion, and Defendants appealed to the Tenth Circuit Court of Appeals, which dismissed the Appeal for want of jurisdiction.

Plaintiffs contend that the following is the only issue for review on Certiorari:

> Did the Tenth Circuit Court of Appeals err in determining that the Order denying Defendants' Motion to Quash Subpoenas and for a Protective Order was not an appealable final decision under 28 U.S.C. § 1291.

Because the Tenth Circuit did not reach the merits of Defendants' assertion of privilege, Questions 2 and 3 set forth in Defendants' Petition are not properly subject to review on Certiorari.

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Cipollone v. Liggett Group, Inc., 785 F.2d 1108 (3rd Cir. 1986) 6

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 5, 6

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 6

Gipson v. Brown, 295 Ark. 371, 749 S.W.2d 297 (1988) 7

Grinnell Corp. v. Hacket, 519 F.2d 595 (1st Cir. 1975) 6

Gulf Stream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 6

NAACP v. Alabama, 357 U.S. 449 (1958) 7

PROVISIONS AT ISSUE

Plaintiffs contend that the First Amendment of the United States Constitution which is set out in Defendants' Petition is not at issue before this Court. The narrow basis for the Tenth Circuit's dismissal of Defendants' appeal was a lack of jurisdiction under 28 U.S.C. § 1291. It is therefore not within this Court's purview to examine the underlying merits of Defendants' assertion of a First Amendment privilege.

The relevant statutory provision for scrutiny before this Court is 28 U.S.C. § 1291, which provides as follows:

> The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands except where direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.[1]

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[1] Defendants have previously argued that the District Court's Order was appealable under 28 U.S.C. § 1292(a) as an injunction. However, Defendants' Petition has not raised this question for review on Certiorari.

STATEMENT OF THE CASE

Plaintiffs submit that Defendants' Statement of the Case is inappropriate for two reasons. First, Defendants' Statement deals almost exclusively with the assertion of privilege and with the merits of the underlying case. Defendants have ignored the narrow jurisdictional grounds for the Tenth Circuit's dismissal in favor of arguing matters which have not been decided by the Tenth Circuit or even the District Court. Plaintiffs thus contend that Defendants' Statement goes beyond the scope of this Court's jurisdiction on Certiorari.

Second, Defendants' Statement of the Case mischaracterizes the facts and the record below. For instance, Defendants state that the underlying litigation arises from a dispute over religious matters when in fact it arises from a dispute over contract and property rights. Defendants state that the bank accounts at issue are Church records and contain only Church money when in fact the accounts are held in the names of individuals and are commingled with personal and trust money. Defendants state that the United Effort Plan Trust ("UEP") was formed "to facilitate the living of the United Order of Heaven" or the "Law of Consecration and Stewardship," *see* Defendants' Petition, at 2, 5, when in fact the Trustees and Church leaders have emphatically stated that the UEP was not intended to establish the United Order of Heaven and serves purposes unrelated to the Law of Consecration and Stewardship. Defendants further state that the UEP owns no property other than real estate when in fact the UEP has held or now holds interests in various businesses and personal property and has

received cash payments in connection with various transactions. Defendants further state that the taxes on UEP property have been paid from Church funds held by the Church leaders when in fact the UEP has sent tax notices and collected separate tax payments from its beneficiaries and has appointed an officer to oversee the collection and payment of taxes. Defendants further state that Plaintiffs have made no contributions to the Trust when in fact the Plaintiffs have all donated sufficient land, labor, or money to be deemed beneficiaries by the Trustees. Finally, Defendants have submitted as Appendix C a summary of the disputed bank accounts purporting to represent Plaintiffs' understanding of each account. In fact, Plaintiffs have submitted to the District Court and included in the record to the Tenth Circuit a detailed and verified summary of the accounts which describes how each account contains commingled funds relating to the UEP or its Trustees.[2]

With respect to the issue of appellate jurisdiction, Plaintiffs offer the following summary of the operative facts. Plaintiffs' Complaint alleges two general categories of claims against the UEP and its Trustees. First, Plaintiffs allege that they contributed money, labor or property to the UEP in exchange for the right to occupy an assigned lot in perpetuity. Plaintiffs claim that the Defendants breached this contract or defrauded the Plaintiffs by declaring all beneficiaries tenants at will on UEP land and then attempting to evict those not in harmony with the

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[2] Because the Tenth Circuit did not reach the merits of the appeal, Plaintiffs believe it unnecessary to set forth a detailed summary of the accounts herein.

religious beliefs of the Trustees. Plaintiffs' second category of claims includes causes of action against the Trustees for breach of fiduciary duty, self-dealing, commingling of funds, and other claims arising from mismanagement of UEP assets. The Defendants' principal defense to both categories of claims is an alleged right of religious immunity arising from the First Amendment. In particular, Defendants have attempted to characterize the UEP as a religious entity and to characterize its management as an act of religious exercise, arguing thereafter that the Court may not exercise jurisdiction over the religious functions of the entity.

In 1989, Plaintiffs identified approximately 17 bank accounts held in the names of certain Trustees. Plaintiffs issued subpoenas to third party banks to obtain the account records, and the Defendants filed a Motion to Quash Subpoenas and for a Protective Order. On November 16, 1990 the District Court denied Defendants' motion and ordered production of the account records. *See* Defendants' Petition, Appendix B. In the context of the District Court's decision, the Court found that there was "no danger that discovery of the Trust's operating accounts will chill the free exercise of religion." Defendants' Petition, at B-12. The Court further pointed out that the case presented "no danger of intrusive government monitoring or regulation of religious activity." *Id.* at B-13. On that basis, the District Court rejected Defendants' claim of First Amendment privilege.

Thereafter, Defendants filed motions for clarification, for certification for interlocutory appeal, and for stay of the order pending appeal. All of Defendants' motions

were denied, and on May 20, 1991, Defendants filed a Notice of Appeal.

On Appeal, the Defendants again argued that the UEP was a religious body and that the discovery of UEP documents would infringe upon rights of free exercise and association. The Tenth Circuit concluded that it was without jurisdiction on appeal because the District Court Order was not a final decision for purposes of 28 U.S.C. § 1291. In particular, the Court ruled that the Order was not appealable under the doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because it did not address a matter "completely separate from the merits of the underlying action." See Defendants' Petition at A-2.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Plaintiffs submit that the Tenth Circuit was correct in concluding that the District Court's Order of November 16, 1990 did not constitute a final decision under 28 U.S.C. § 1291. Under the *Cohen* doctrine, the Supreme Court has held that an interlocutory ruling may be appealable as a "collateral order" if the following conditions are satisfied:

> First, the order must "conclusively determine the disputed question." Second, the order must "resolve an important issue completely separate from the merits of the action." Third and finally, the order must be "effectively unreviewable on appeal from a final judgment."

Gulf Stream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

In this case, the Tenth Circuit ruled that the District Court's Order was not a collateral order under *Cohen* because it was not completely separate from the merits of the case. The Tenth Circuit's decision followed well-settled and universally-accepted principles of federal law. Specifically, in at least three cases, appellate courts have refused jurisdiction over discovery disputes on the grounds that resolution would necessarily entail consideration of the underlying merits of the lawsuit. *See Grinnell Corp. v. Hacket*, 519 F.2d 595 (1st Cir. 1975); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986); *Borden Co. v. Sylk*, 410 F.2d 843 (3rd Cir. 1969). Defendants have not identified any split of authority or unsettled question of law requiring resolution in this Court, nor have they cited authority for their position that a discovery order may be reviewed under *Cohen* even if it requires inquiry into the merits. In short, Defendants have identified no error of law at either the District Court or the Circuit Court level, but have merely sought a different outcome based on their version of the facts.

Ironically, Defendants' Petition actually confirms the Tenth Circuit's conclusion by addressing numerous issues central to the merits of the underlying lawsuit. In particular, Defendants ask this Court to examine the relationship of the FLDS Church and the UEP, to ascertain the charitable or sacerdotal nature of the UEP, and to define the scope of the Trustees' duties in administering UEP assets. Each of these matters is central to the merits of the ongoing litigation, and the District Court has expressly

reserved each for trial. In short, Defendants have sought an adjudication on appeal of issues central to the merits of the underlying litigation even before those issues have been decided in the District Court. Plaintiffs contend that 28 U.S.C. § 1291 does not contemplate resolution of the merits of a lawsuit in this manner.

To the extent that inquiry into Defendants' claim of privilege is appropriate on Certiorari, Plaintiffs contend that Defendants have not identified any error of law in the District Court's reasoning. Instead, Plaintiffs have relied on state court cases such as *Britt v. Superior Court of San Diego County*, 20 Cal.3d 844, 143 Cal. Rptr. 695, 574 P.2d 766 (1978), and *Gipson v. Brown*, 295 Ark. 371 749 S.W.2d 297 (1988), which do not accurately reflect the federal law. Plaintiffs contend that the District Court properly applied the well-established principles laid down in *NAACP v. Alabama*, 357 U.S. 449 (1958), and its progeny in rejecting Defendants' claim of privilege. Because the District Court found that no chilling effect on the free exercise of religion was presented in this case, it correctly concluded that no privilege applied. For this reason, Plaintiffs contend that the District Court's decision was proper and that Plaintiffs should be afforded full and fair discovery in this case.

CONCLUSION

In an attempt to broaden the scope of this Court's review, Defendants have presented issues beyond the scope of the Tenth Circuit's decision dismissing their

appeal. Plaintiffs contend that the Tenth Circuit's dismissal of the appeal was proper because the District Court's discovery order necessarily involved resolution of issues central to the merits of the case. For these reasons, Plaintiffs urge this Court to deny Defendants' Petition for Writ of Certiorari.

Respectfully submitted,

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